96-96

IMPROVEMENT IN ADMINISTERING FALSE REPRESENTATION STATUTE

HEARING

BEFORE THE

SUBCOMMITTEE ON POSTAL PERSONNEL AND MODERNIZATION

OF THE

COMMITTEE ON POST OFFICE AND CIVIL SERVICE HOUSE OF REPRESENTATIVES

SECOND SESSION

ON

H.R. 6307

A BILL TO AMEND TITLE 39 OF THE UNITED STATES CODE TO IMPROVE ENFORCEMENT OF PROVISIONS RELATING TO FALSE REPRESENTATIONS AND LOTTERIES, AND FOR OTHER PURPOSES

MAY 7, 1980

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MAIL ORDER FRAUD

WEDNESDAY, MAY 7, 1980

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON POSTAL PERSONNEL
AND MODERNIZATION,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 304, Cannon House Office Building, Hon. William Clay (chairman of the subcommittee) presiding.

Mr. CLAY. The subcommittee will come to order.

I am pleased to convene today's hearing to consider a bill, H.R. 6307, introduced by my colleague and the distinguished chairman of our full committee, Mr. Hanley, to provide new enforcement tools for the U.S. Postal Service to deal with the ever-increasing problem of schemes conducted to obtain money through false representations.

H.R. 6307 was introduced as a result of hearings held by Mr. Hanley's Subcommittee on Investigations. Those hearings pointed out that mail fraud schemes are having a disastrous effect and causing untold losses of hundreds of millions of dollars by the American public—mainly the disadvantaged and the elderly—who have become innocent victims preyed upon by unscrupulous mail order operators.

The false representation statute, section 3005 of title 39, United States Code, which provides for civil remedies apparently lacks the necessary enforcement powers while criminal fraud proceedings are too time consuming and do not provide sufficient deterrence.

The legislation before us today seeks to assist the U.S. Postal Inspection Service in deterring such schemes by giving the Inspection Service the ability to quickly acquire and assess suspect products or services offered through mail order advertisements, providing for penalties of up to $10,000 for the violation of mail stop orders, and for court orders where there is a failure to respond by a promoter.

Thus, for the first time, the Postal Service would not have to wait for a mailed response giving the "one shot" mailer a great advantage.

This morning the subcommittee will hear from the bill's sponsor, representatives of the Postal Inspection Service, and representatives of the Direct Mail/Marketing Association.

The first witness this morning is Hon. James M. Hanley, chairman of the committee. Mr. Hanley.

STATEMENT OF HON. JAMES M. HANLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. HANLEY. Mr. Chairman, my deep appreciation to you for your very prompt attention to the legislation. I hope very much that as a result of these hearings that severe restrictions will be imposed that will terminate these abuses.

Each year American mail patrons lose $600 million to the operators of mail fraud and false representation schemes.

Unfortunately, criminal prosecutions of mail fraud charges are presently inadequate to curb this loss, as mail fraud cases naturally require proof of intent followed by lengthy criminal trials and appeals.

Ten years ago the Post Office and Civil Service Committee and the Congress enacted a statute giving the Postal Service authority to issue mail stop orders so that a postmaster could stop mailed receipts from going to a promoter who had used false representations in his advertising.

The postmaster could examine any promoter's mail directed to a particular address, forward mail to the promoter unrelated to the particular false advertising and return the rest to mail patrons.

This action provides some degree of protection to the public from false advertisng and mail fraud schemes.

However, unfortunately the program has not been as effective as we would like because mailers evade mail stop orders by merely changing their address. Some promoters make a one shot mass mailing, quickly closing their business to thwart prosecution and open with a new product at a new address. Other mailers ignore the mail stop orders since violation of orders carries no penalty.

H.R. 6307, which I introduced in January of this year after a hearing in my subcommittee in November 1979, revealed certain inadequacies in the false representation program. This legislation will correct major weaknesses in the civil enforcement program.

My bill provides for penalties of up to $10,000 for each violation of a mail stop order; authority for the Postal Service to immediately purchase products advertised for mail delivery at the business site, rather than having them wait for the mail purchase of and reply of a mailer before product testing in postal laboratories can begin. This will avoid the one shot mailing technique; and the bill will result in personal and/or corporate responsibility for the violation of mail stop orders, so they can no longer evade the law by a change of address.

These provisions are supported by the Postal Service and by the National Council for Better Business Bureaus. I understand you will also hear testimony this morning from the Direct Mail/Marketing Association in support of H.R. 6307.

The bill is necessary, Mr. Chairman, because false representation operations and mail fraud generally choose as victims the elderly, the unemployed; those least able to afford $600 million in losses annually.

False representation schemes seek out those depressed about their health or their economic future. False advertising finds fertile ground with those who are about to lose all hope.

Prudent action must be taken to protect the public and I would suggest to the subcommittee that H.R. 6307 will provide the Postal Service with the additional enforcement tools they need so badly.

Again I want to thank our very distinguished chairman for the cooperation and assistance his subcommittee has given me in this matter.

Thank you, Mr. Chairman.

Mr. CLAY. We certainly want to thank you for the initiative that you took in bringing this matter to our attention.

I would like to ask you—you say in your statement that false representation operations and mail fraud generally chooses victims, the elderly and the unemployed—can you describe what some of the schemes are that are used to prey on these people?

Mr. HANLEY. For instance, appeals to the elderly with respect to ideal retirement situations that really don't exist. They suggest that the person buy a nonexistent lot in one of the sunshine States. They state that for only a $10 fee they will tell you how to acquire a lot in Florida or Arizona.

That would be one illustration.

The other old trick is the work-at-home gimmick. Send us $10 and we are going to put you on the road to self-employment. You can type at home and it is going to provide you with at least $100 a month in additional income.

I am told that these promoters zero in on younger people with a pitch for certain types of cosmetics that are supposedly at bargain basement prices. These are some of the classic demonstrations of what we are talking about. Unfortunately, the person responds and it is a long time before the promoter responds and when that response does come, lo and behold, the person who responded to the direct mail piece then realizes that he or she has been had. It is too late then. The sender finds that the business is no longer at that address.

Mr. CLAY. On your first example, where for $10 they will send you a way of purchasing a piece of nonexistent land for $899, aren't there presently criminal statutes against that kind of fraud?

Mr. HANLEY. There are, but again it is too late and by the time the person realizes that he or she has been had, that promoter has packed up his or her bags and is off to another fertile valley, and it is very hard to apprehend that person.

With this legislation, once that direct mail piece is put together, the postal inspectors can, say, here is Apex Promotions, Inc., a questionable outfit and within hours be onsite for an examination of the product.

Mr. CLAY. Will this legislation result in more restrictive regulations and redtape for the businessmen who are mailers and thus add another burden in conducting their business?

Mr. HANLEY. No; not at all. This legislation, I am happy to say, enjoys the support of the better business bureaus, the chambers of commerce, and the direct mail people whom you will be hearing from later this morning. It enjoys support from these entities. It doesn't impose any burdensome regulations. It is purely an enforcement tool. It is a method, a tool, which provides for prompt examination of potentially fraudulent material, which could lead to an immediate charge by the Postal Inspector.

READEX FICHE

Mr. CLAY. Is that what you mean when you say in your statement, "Violation of Mail Stop Orders."

Mr. HANLEY. That is right, yes, Mr. Chairman.

Mr. CLAY. So, in other words, the Postal Service would go immediately to the place, they would test the product, and they would issue a stop order if it was not in compliance with what they had advertised.

Mr. HANLEY. Yes. The mail stop order is subjected to the Administrative Procedure Act.

Mr. CLAY. And then for each violation they could be fined up to $10,000.

Mr. HANLEY. That is right. In the meantime, anything that happens to be coming back to that return address would be impounded by the Postal Inspector so that those moneys would be safeguarded and ultimately returned to the sender.

Mr. CLAY. Thank you.

Do you have any questions?

Mr. JOHNSON. No questions.

Mr. CLAY. Thank you, Mr. Chairman.

Mr. HANLEY. Thank you, Mr. Chairman.

Mr. CLAY. Our next witness is Mr. Fletcher F. Acord. Good morning.

STATEMENT OF FLETCHER F. ACORD, ASSISTANT CHIEF INSPECTOR, CRIMINAL INVESTIGATIONS, U.S. POSTAL INSPECTION SERVICE, ACCOMPANIED BY GEORGE C. DAVIS, ASSISTANT GENERAL COUNSEL, CONSUMER PROTECTION DIVISION

Mr. ACORD. Good morning.

Mr. CLAY. You may proceed as you wish.

Mr. ACORD. Thank you, Mr. Chairman.

I am Fletcher F. Acord, Assistant Chief Postal Inspector for Criminal Investigations.

Accompanying me today is Mr. George C. Davis, Assistant General Counsel, Consumer Protection Division of the U.S. Postal Service Law Department.

We welcome the opportunity to appear before this subcommittee today to discuss H.R. 6307, a bill which we firmly believe would provide much needed improvement in the administration of the false representation statute.

On November 7, 1979, Mr. Kenneth H. Fletcher, then Deputy Chief Postal Inspector and now Chief Postal Inspector, testified before this committee's Subcommittee on Investigations, regarding the overall program of the Postal Service to combat fraudulent mail schemes.

A portion of that testimony touched on our use of civil and administrative procedures under 39 U.S.C. 3005 and 3007, which involve so-called mail stop orders, intended to prevent false advertisers from receiving mail orders from their intended victims.

The testimony also discussed changes which would increase our effectiveness in this area. I have submitted a copy of Mr. Fletcher's testimony and ask that it be made a part of the record.[1]

Over a century ago congressional concern to protect citizens from schemes involving the mails led to the enactment of both the

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[1] See "Mail Fraud" hearing, 96-69.

criminal mail fraud statute, which we presently know as 18 U.S.C. 1341, and the administrative statute, which we presently know as 39 U.S.C. 3005.

These consumer protection statutes continue to be important today. We believe, however, that the civil statutes are not as effective as they should be in dealing with the sophisticated mail order frauds which are now unfortunately too common. H.R. 6307 deals very effectively with some of the principal problems.

The principal sanction involved in an administrative action is the mail stop order, which prevents the consumer's money from reaching the operator and allows it to be returned to the sender. Cut off from the profits, the operation will fail.

To be effective, however, we must quickly identify the promotions apparently involving false representations, get a sample of the product, and examine or test it. Our administrative hearings involve the same burden of proof as in any civil litigation; we must present a preponderance of evidence to support the action. Frequently this can be accomplished only after examination of the product.

One of the weaknesses of the civil statute as now written is our inability to quickly obtain samples of advertised products.

Many deceptive operators are aware of our test purchase investigative procedures and delay shipping the products until they believe that they have realized the maximum return on their promotions.

Moreover, common mail order marketing techniques involve one shot advertising, for example, the familiar full-page Sunday supplement ads, which will draw responses for only a very short time.

We recently reviewed approximately 30 current cases in which test purchases were made and found it took an average of 5.5 weeks to obtain the product. The needed authority which this bill would provide is simply to require the seller to provide the product to the Postal Service upon demand and tender of the advertised purchase price.

Another weakness in section 3005 which would be remedied by this proposed amendment is the lack of any sanction to discourage operators from circumventing an outstanding mail stop order by simply modifying their business name or by changing their address and continuing to sell the same product under the same false representations.

Presently we must initiate administrative proceedings each time the promoter renews the activity under a different name. And each time the promoter keeps getting the consumer's money until a new proceeding can be brought and a new order obtained. The way the bill would help us deal with this type of situation is by authorizing a civil penalty of up to $10,000 for those operators who evade or attempt to evade the effect of an order.

Let me give you a few examples of the kinds of cases where this would help. We had a long series of investigations of an individual who peddled phony aphrodisiacs by mail. In the course of his activities over the years, he used about 55 different names and addresses.

Let me here digress from my written statement just a little bit to comment on a unique phase of his activities. Because they involved

aphrodisiacs, we were hard pressed to find a witness who would come forward and testify against him, and so any proceeding that we undertook obviously had to be by the development of our own evidence.

At least 25 administrative actions were filed. After each filing he simply moved on to new addresses, re-establishing the promotion under different names. He was put out of business only after he was finally convicted of mail fraud under the criminal statute. In the meantime, many consumers were defrauded and could not get their money back.

Then there is the operator in Florida who has been promoting 10 to 12 products including energy pills, vitamins, diuretics and diet plans. Four false representation orders have been issued against the operator within the last 3 years. Each time a false representation order has been obtained against him, he has merely changed the trade style or address and continued to promote the products. A civil penalty would have been an effective tool against this type of operation.

The civil penalty provisions in H.R. 6307 include effective protections for the rights of the persons affected. The promoter would be entitled to advance notice of the charges and the proposed penalty and a reasonable time to answer.

An evidentiary hearing on the allegations would be held by an administrative law judge if requested. Full consideration of any extenuating or hardship circumstances would be required. Finally, any adverse decision could be appealed to a Federal appeals court.

Chairman Hanley, during the prior testimony, to which I referred earlier, specifically invited Mr. Fletcher to review the current statutory tools with which we work and propose any needed adjustments.

H.R. 6307 addresses two of the major deficiencies which are of concern to us. The inability to obtain the product and the lack of a civil penalty. There is a third needed adjustment which I would like to address at this time.

I am sure all of the committee members have seen advertisements for the type of fraudulent promotions which sections 3005 and 3007 are designed to combat. Frequently these advertisements will contain before and after photographs or refer to alleged tests that had been conducted involving the product.

These assertions often are the significant misrepresentation in the advertisement. Experience has shown us that in many of these cases the testimonials or testing results do not exist.

In our administrative cases, we currently have no means of determining at the outset whether these materials exist or the validity of their claims.

Since we have the burden of proof, the promoter need never disclose the information. We suspect such materials do not exist when the promoter does not introduce them in the defense at the subsequent hearing. The way to deal with this problem would be to authorize the Postal Service to have access to documents on which such advertising claims are based.

If a request to inspect and copy such documents were treated in the same fashion as a request for an example of the product under

H.R. 6307. the advertiser would be well protected against any abuse. If he declined our request, we could only enforce it by going to court.

A court would not enforce an unreasonable request. The refusal of a promoter to honor a reasonable request would be probable cause to believe that the statute is being violated. If we had the ability to bring such a fabrication into the light at the earliest opportunity, the case would be swiftly settled. Without this ability, our only alternative is the slow and often costly process of testing and disproving the validity of the claims.

Let me cite a few recent examples of cases in which such authority could have been effective in saving the consumer substantial amounts of money. You have before you, Mr. Chairman, a notebook [1] which contains examples of advertisements for the promotions which I am about to discuss.

If you will turn to tab 1 the first six photographs relate to a firm in New York called Consumer Testing Center, which recently flooded the mails with a massive ad campaign which is estimated to have reached 40 million Americans. The literature offered 600 free gifts to anyone who would become a product evaluator and test certain name brand products. Pictured were name brand items such as radios, clocks, calculators, and a variety of drug and cosmetic products. As you can see from the advertisement, they carry common trade names, familiar to all.

All that was required was an enrollment fee of $5 and an agreement that the evaluator would pay the cost of shipping. The consumer was not told that the cost of shipping was invariably calculated at a rate of 17 cents per item and the shipping cost could total as much as $102.

Additionally, there were no clocks or radios and the free gifts consisted of small sample size portions of off-brand products. The advertising said that Consumer Testing Center had agreements with major manufacturers throughout the country authorizing consumer testing to enroll product evaluators.

No such agreements existed and an administrative subpena served on the promoters would have disclosed that fact in short order. It is conservatively estimated this firm took in $1¼ million from the time we became aware of the promotion until we were able to collect sufficient evidence for a mail stop order.

The need to act quickly frequently goes beyond just dollars savings for the consumer. Personal health and safety can be involved.

If you refer to photographs 7 and 8, Mr. Chairman, in——

Mr. CLAY. Under tab 1? What is 7 and 8?

Mr. ACORD. That would be the Bates advertisements and then the testimonial letter from Dr. Gamel.

In late 1979, advertisement appeared in newspapers for the so-called Bates Method of eye exercises that allegedly could cure all types of vision problems including cataracts. The ad contained testimonials supporting these claims.

We received an unsolicited letter on the Bates method from Dr. John W. Gamel, assistant professor of ophthalmology at the University of Louisville, in which he wrote:

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[1] Not reproduced in this hearing.

> I have had the unpleasant experience of reading Dr. Bates book * * * the fact of the matter is that Dr. Bates method explicitly directs patients to ignore standard medical advice, advising them instead to do such visually destructive things as gaze directly into the sun and ignore their medication for such disorders as glaucoma.

The FDA doctor who examined the program for the Postal Inspection Service reported:

> Failure to seek competent medical advice for the serious conditions listed by the Bates method could result in serious impairment of vision and possibly blindness. Reliance on these gross misrepresentations is a distinct hazard for the purchaser of the plan.

During the 66 days it took us to obtain the program and get a doctor's opinion, we estimate consumers lost $50,000. But, more importantly, some may very well have risked damage to their sight by relying on the false claims.

If you will turn to the next advertisement in your book, Mr. Chairman, the Eric-Way Corp. advertised a diet formula alleging that up to 84 pounds of fat could be lost in only 60 days even while continuing to overeat.

The formula was alleged to be the result of a 14-year scientific study by a European doctor. Although we were able to obtain a mail stop order against this firm in only 23 days, over $70,000 was collected by the operators in that brief period. If we could have demanded a copy of the study, we might have acted much sooner.

During 1979 the Postal Service completed 137 administrative actions against domestic promoters. Considering the average time it took us to develop the necessary evidence, we estimate that the American public lost up to $10 million which might have been avoided had we had the limited administrative subpena and purchase requirement authority I have mentioned.

This does not count the many other investigations in which we found it was too late to take any civil action because the operator had completed the promotion and abandoned the business before we could get the product. In the notebook are advertisements pertaining to several of these schemes.

Again if you will permit I will depart from my prepared text and discuss these for just a moment with you.

If you will turn to the first photograph following tab 2, it is a photograph of an advertisement concerning an energy saving device.

That advertisement ran from April 1979 to August 1979. We estimate that there were 35,000 victims with a potential victim loss of over $400,000 before we were able to stop that scheme.

Turning to the next two spread sheets, which are photographs of two lovely models, as you can see, the advertisements are the same, in which it is advertised that you can lose 10 pounds, 20 pounds, 50 pounds, or more, the advertisement on the left-hand side was advertised in a national magazine in January 1980. We made an immediate test purchase and have still not received the test purchase. The advertisement on the right was rerun in Ebony in March 1980 and we have not yet received the test purchase that we made on that advertisement.

We estimate that there have been approximately 12,200 responses to these two advertisements with a minimum victim loss of $120,000.

Turning the page again, an advertisement on natural prostate rejuvenation, the advertisement first appeared in June 1979. We made a test purchase on July 1, 1979. Our test purchase was received on September 21, 1979, some 2¾ months later. By that time the firm was out of business. We estimate there were 6,400 responses to that advertisement with a minimum customer loss of $82,000.

Turning to the next advertisement, one for a skin disease, the test product was ordered on November 24, 1978. This was not received until February 26, 1979, at which time the firm was out of business.

We estimate there were 18,000 victims with a victim loss of approximately $100,000.

Finally, on the last page there is an advertisement for which we have yet to receive the product. We estimate there were 7,500 victims with a minimum loss of $110,000.

In conclusion, the Postal Service appreciates the introduction of H.R. 6307 and strongly favors its enactment. We believe that it would be a big help in civil enforcement efforts.

We would be pleased to work with the subcommittee to develop reasonable language for the bill to deal with the additional problem of access to studies relating to the operator's advertising claims.

We will be pleased to try to answer any questions you may have.

Mr. CLAY. Thank you.

At the bottom of page 8 in your testimony you said that during 1979 the service completed 137 administrative actions and then at the top of page 9 you said, "We estimate that the American public lost up to $10 million."

Mr. ACORD. On those 137.

Mr. CLAY. So that explains the difference between the chairman's opening statement of $600 million loss and your figure.

Mr. ACORD. Yes; it does.

Mr. CLAY. The witnesses who will testify following you from the Direct Mail Marketing Association have proposed two changes in this bill. They propose to require the Postal Service to inform the person against whom a civil penalty is being assessed of the opportunity for a hearing, and to allow the court of appeals to review the facts underlying a decision of the Postal Service to assess civil penalties should such a decision be appealed. What is your position on these two proposed changes?

Mr. DAVIS. If I might answer that, first of all, the procedure that we have outlined in the proposed legislation would require notice, an opportunity to be heard before the penalty could be assessed by the Postal Service. That is built into the statute. We have no way to avoid that.

As to having hearings before the court of appeals on the merits, it seems to me that that is a feasible way to do this, but it is a waste of a lot of time.

If we are going to have an administrative hearing to determine whether or not the statute has been violated, it would seem to me to be not productive to have all of that effort reproduced in the court of appeals.

Normally administrative orders are upheld by the courts if they are supported by substantial evidence of record. That same standard of law would apply to these proceedings and I see nothing but inefficiency in duplicating the efforts in the court of appeals. It might be better to have the whole proceeding conducted there or to have the entire proceeding conducted in the district court rather than hold two hearings in two separate places.

Mr. CLAY. You consider that a waste of time?

Mr. DAVIS. Yes, not a waste of time to ascertain the facts, but to do it twice. If the agency has developed a record which will withstand judicial review, that is, a record that is supported by substantial evidence, the court of appeals can read the record. It is there before it. It would be introduced in the proceedings, and if the court looked over the record and found that we were way off in left field somewhere and that our actions were not supported by evidence; it would not support our decision, but to require that the court rehold the same hearing de novo——

Mr. CLAY. Is that what they are suggesting?

Mr. DAVIS. That is my understanding of the suggestion.

Mr. CLAY. I thought it was just a review of the facts as the court of appeals would do in any other situation. The court of appeals doesn't re-try, do they?

Mr. DAVIS. That is the suggestion as I understand it here, that the court of appeals would de novo review the facts in the administrative case.

Mr. CLAY. So you are saying there would be two trials?

Mr. DAVIS. Yes; and I don't see the point in that. It normally is not done in any administrative proceeding that I am aware of.

I don't see any reason why it should be done here. Again, remember that whatever we do is conducted pursuant to the Administrative Procedure Act.

We have to hold hearings. We have to conduct the hearings on the basis of cross-examination of witnesses. There has to be a court reporter, a transcript of proceedings. The entire record would be available to any court asked to enforce our actions. So that whatever we are doing is totally subject to judicial scrutiny.

If the court finds that we are acting invalidly, it would not support our action. I don't know the point of the suggestion of having de novo review.

Mr. CLAY. I will have to look into that more closely to find out exactly what is being recommended.

Have you made any efforts to deal with the problem of mail fraud such as advertising campaigns to alert the public to these schemes?

Mr. ACORD. Yes, Mr. Chairman. We have undertaken a very extensive, comprehensive consumer protection program by which we attempt to educate the American public. That was undertaken approximately 1 year ago and we believe that we are seeing some considerable results from it if measured only by the number of complaints we have received which refer us to those efforts of educating the American public but, as you know, educating the American public or any group of people is an immense, difficult task.

Mr. CLAY. If subpena authority is included in this bill, wouldn't the purchase requirement become unnecessary?

Mr. ACORD. I think not, Mr. Chairman. In many instances the issue relating to the product is the validity of that product's ability to do what the advertising claims it would do.

For instance, given a diet pill, although we would obtain the diet pill by the advance purchase procedure the bill is proposing, we still would have to subject the diet pill to a competent medical review to determine the efficacy of its ingredients, and so as a consequence we still are delayed somewhat by the testing period in any efforts we would make to stop the promotion.

Mr. CLAY. What other things besides testimonials or testing results might you use a subpena to obtain and would this authority extend to the finanical records of the operator?

Mr. ACORD. Let me use the second part of your question as the example. I foresee some instances where the finanical records of the company or corporation would be necessary in our review, in two areas perhaps.

Schemes which address a means or a method by which you can become a millionaire overnight and in which the advertisement claims that the promoter became a millionaire overnight by using the scheme would perhaps be something we would want to look at—is in fact the promoter a millionaire and was that made under the claims of the promotion.

I think the second thing that we would want to know is where there is a guarantee for refund, what provisions do they have for refund? Oftentimes they guarantee double your money back. I think we would want to know what provisions are available within the corporation to in fact guarantee double your money back.

Mr. CLAY. This material that you say you would like to subpena financial records, et cetera, for the administrative action, could it later be used in a criminal case?

Mr. ACORD. Only if it were obtained with the usual constitutional safeguards that would have to apply in any criminal action.

Mr. CLAY. But you would have the authority to then use this material in a criminal action.

Mr. ACORD. Again only if it were obtained having given the operator the appropriate notifications required under the constitutional guarantees against self-incrimination.

Mr. DAVIS. The promoter might be expected to claim if he were a defendant in a criminal case that he was compelled to testify against himself by honoring our subpena, and my guess is that if he made that claim it would in most cases be found out that in many of the instances, although we are likely to use this in very few cases, in most of those cases I think the fifth amendment would bar use of the material in the criminal case.

There may be a few I can't think of where it might get by, but the courts go pretty far toward protecting people's rights under the fifth amendment, as they should, and if we are compelling people to introduce information that might incriminate them, the fifth amendment should lead the court to not use that evidence.

Mr. CLAY. I don't think this bill refers to a problem that was brought to my attention last night, but I am sure that there must

be some protections against individuals who have been victimized as this person was, and by reputable companies.

He informed me last night and showed me the stack of complaints, copies of the letters he had sent to the companies. Somebody played a prank on him and they mailed in some 20 magazine subscriptions and he notified each of the companies on several occasions. He notified the post office, made at least three complaints to the post office, and after 12 months he is still receiving the magazines.

They are continuing to bill him. Several of the companies have turned the matter over to collection agencies. He is just being harassed. Now, what do you do in a case like that?

Mr. ACORD. We have several things we could do. The most direct thing for an individual such as you have cited in your example is for that individual to contact the nearest postal inspector.

Mr. CLAY. That is what he did almost a year ago.

Mr. ACORD. Did he contact the nearest postal inspector, or the nearest post office, Mr. Chairman?

Mr. CLAY. Yes; he has even talked to somebody in the Postmaster General's office

Mr. ACORD. Then I would invite him to call me directly and I will see that his problem is resolved. The normal way that we resolve this problem is through our consumer complaint program where we make contact on behalf of the individual and notify the magazines that are sending him those subscriptions that he is not the individual who ordered them, that it is a fraudulent order. They generally then as quickly as their processing will allow, will remove him from their mailing orders and furnish to us the fraudulent order on which the subscription was originally ordered.

We then investigate the case as a case violating the criminal statute.

Mr. CLAY. Whom should he call in your office?

Mr. ACORD. If he calls me directly and represents himself as the individual to whom you referred, I will handle it myself.

Mr. CLAY. You mean just an ordinary citizen couldn't get in touch with you?

Mr. ACORD. Oh, my phone is listed in the phone directory and I get a lot of telephone calls about that and a good many other things, Mr. Chairman.

Mr. CLAY. Thank you. I have no further questions.

Mr. Johnson?

Mr. JOHNSON. No, Mr. Chairman.

Mr. CLAY. We certainly want to thank you for your testimony.

Mr. ACORD. Thank you.

Mr. CLAY. Our next witness in Mr. Richard Barton of the Direct Mail/Marketing Association.

STATEMENT OF RICHARD BARTON, VICE PRESIDENT FOR GOVERNMENT AFFAIRS, REPRESENTING DIRECT MAIL/MARKETING ASSOCIATION

Mr. BARTON. Before I get started, I want to offer my services as vice president of the Direct Mail/Marketing Association to help the Postal Service to test aphrodisiacs if they are having any trouble in that.

Mr. DAVIS. Your offer is accepted.

Mr. BARTON. My name is Richard Barton, Mr. Chairman, and I am vice president for Government affairs of the Direct Mail/Marketing Association. The Direct Mail/Marketing Association is an international trade association consisting of 2,000 companies and 3,500 individuals involved in every form of direct response marketing, and of course direct mail marketing is the most important and largest constituent of our activities.

Founded in 1917, DMMA has consistently maintained an intense interest in promoting and enforcing ethical practices in the industry. We have developed an extensive code of ethics for all forms of direct response marketing, including mail, telephone, and broadcast advertising.

I will submit a copy of our code of ethics for your information at the end of this testimony.

Other examples of our commitment to ethical activity are our mail preference service and our freedom to mail programs. DMMA's mail preference service provides an opportunity for people to remove their names from mailing lists if they wish to stop receiving unsolicited advertisements. The association broadly advertises advertises this service in major national magazines and newspapers and some radio and television advertising, and we are about ready with the cooperation of the Postal Service to embark on a national advertising campaign in which advertisements and posters will be in every post office throughout the country about this program.

Mr. CLAY. Will my friend be able to contact you also and get his name off?

Mr. BARTON. I was afraid you were going to ask that. Yes, sir, be happy to do it.

Our freedom to mail program urges companies which rent their mailing lists to give customers an opportunity to be taken off their lists before the lists are rented. A large percentage of our member companies which account for the bulk of advertising mail throughout the country now participate in this program.

In addition, we are developing a similar program for telephone marketing which is now in its planning stages.

While these programs are not directly related to the subject matter included in H.R. 6307, they do emphasize DMMA's strong commitment to promoting ethical practices.

More to the point is DMMA's mail order action line. Essentially MOAL is a bureau within the association which handles complaints about unfair or fraudulent activities in the direct response industry.

During the past year we have handled over 25,000 complaints nationwide. Most of these complaints are handled simply by contacting the company involved and working out mutually satisfactory arrangements.

The more difficult complaints undergo rigorous study and investigation by the structure established by DMMA to promote ethical practices and resolve problems within the industry.

To this end, DMMA has established a fully staffed, professional, ethics department. It is headed by a director of ethical practices. The director is responsible for liaison with Better Business Bu-

reaus, the Postal Inspection Service, consumer affairs groups, and other agencies and organizations which may be involved with fraud or false representation in direct response marketing.

He also manages a DMMA task force on companies which generate a substantial number of complaints. He also conducts preliminary investigations of alleged unethical practices and uses his office to attempt to resolve the complaints before they are sent on to our committee on ethical business practices.

The committee consists of 15 DMMA members and meets eight times a year. Its job is to handle persistent complaints which cannot be resolved immediately by staff. This is essentially done through peer pressure since members of the committee on ethical business practices are prominent in our industry. In particularly difficult cases, the committee will refer cases to the Federal Trade Commission or the Postal Inspection Service if the situation warrants.

Finally, DMMA has recently established an ethics policy committee consisting of seven members who meet six times a year. This committee develops general ethical policy for the association. For example, one of its major projects is working out the legal details to allow member companies to use the DMMA logo as a symbol of ethical practices.

These are only brief descriptions of some of DMMA's activities to promote ethical practices. We would be happy to supply the subcommittee with further detailed information about any of our programs or activities.

DMMA strongly supports the general thrust of H.R. 6307 and the efforts of the Postal Service to strengthen its efforts against misleading and fraudulent practices in the mail order industry. We believe these practices hurt the industry and that a concerted effort to eliminate them will be of great benefit to us all.

One of the reasons that these fraudulent practices hurt the industry is that there seems to be a greater tendency on the part of the public to blame fraudulent practices on the mail order industry as a whole. This has not happened.

For example, in retail marketing, if a particular store is accused of shady practices, it does not occur to the public to blame retailing in general. But all direct mail marketers get a black eye when one of their number engages in fraudulent activities.

Although we support the general thrust of the bill, we have several comments to make about the specific provisions.

H.R. 6307 gives the Postal Service the authority to demand any article or service that a person offers for sale by mail. Failure to comply with such a demand constitutes probable cause to believe that the law pertaining to false representations has been violated.

Under existing law, the Postal Service then may issue an order directing the postmaster of the post office at which the mail arrives to return such mail to the sender marked as in violation of the law. Before the postmaster may do this, the person suspected of violating the law is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender.

The bill also provides that any person who evades or attempts to evade the effect of the order issued pursuant to the section pertain-

ing to false representations and who continues or resumes conduct proscribed in the order, is subject to a civil penalty of $10,000 for each violation.

We favor this approach as we would probably favor any statute or regulation that would deter fraudulent mail order operators. Assisting the Postal Service to help bring a halt to the use of schemes and devices used by marketers for obtaining money through the mail by means of false representations has long been, and continues to be, a primary function of this association. Thus we can wholeheartedly support the provisions of this bill that impose civil penalties on wrongdoers.

I must raise one warning, however, and I have to raise it because our lawyers told us to. I personally have not looked into this issue carefully and I suspect the Postal Service is on strong ground, but our attorneys in New York have raised the question as to whether the Postal Service as an independent establishment of the executive branch of the U.S. Government has the authority on its own to assess civil penalties without the approval of a judge. We do not oppose the bill because of that.

In fact, we are strongly in favor of the bill. But our lawyers would suggest that the subcommittee be assured that the Postal Service would not be subject to legal challenge in this area.

Subsection (f) of the proposed addition to section 3005 provides for due process to be followed in determining the amount of any penalty. We support these provisions and in particular support subsections (f) (2), (3), and (4) as necessary to any acceptable legislation in this area.

We would suggest that in subsection (f)(3) the notice should alert one to the opportunity to request the hearing provided in (f)(4).

We agree with Mr. Davis that that certainly is implied in the statute and the Postal Service would do it. We just thought it would make it a little clearer if subsection (f)(3) specifically said that when notification was given to a person that he ought to be notified specifically in writing that he has a right to a hearing.

Subsection (f)(6) provides for appeal to the court of appeals of any decision of the Postal Service in this area. We certainly agree with this right of appeal; however, we do question the provision of the subsection which prevents the court of appeals from examining the facts underlying the decision to impose civil penalty.

This in essence shifts the fact finding functions from the judiciary to the Postal Service. In this case, at least, the shift does not appear to be necessary to the Postal Service's ability to carry out the law effectively.

We see no reason why Federal court should not retain the opportunity to review the underlying supportive facts as well as the decision rendered by the Postal Service. Giving the court authority to conduct a trial de novo would be an added protection against arbitrary and capricious action.

Again, I think we could agree with most of what Mr. Davis said here today. We don't make this suggestion in order to slow down the Postal Service or go through the same ground twice. I am not an attorney, so I can't discuss the specific reasons why our attorneys recommended this.

Really all we want is to be assured that the power of appeals or district court, if that would be the case, would have at least an opportunity to look at the facts—and we do use the term trial de novo, although that might be too strong a term there—to look at the facts because even though it never happens in the Postal Service, in other administrative proceedings that we have had dealings with, both before and after I came with the association, sometimes the facts are quite in dispute and the courts have difficulty touching them.

Finally, Mr. Chairman, we would like to offer a nonlegislative proposal to the Congress and to the Postal Service. We would be happy to offer the services of our committee on ethical business practices to you and the Postal Service whenever it is believed that a violation of the relevant law has occurred, or in fact whenever it is believed that an unethical action has occurred even if it might not be considered a violation of law specifically.

If the appropriate documentation were provided us, our committee on ethical business practices would fully investigate the matter in the ordinary course of its administration. If the committee felt that a violation had occurred, it would turn over its entire investigative files since the committee conducts its business under strict confidentiality rules.

We believe that the expert opinion of our ethics committee would be a valuable tool for the Postal Service in fighting false representations in mail order advertising.

In summary, DMMA supports the general provisions of H.R. 6307. We would make two recommendations for changes in the legislation.

First, subsection (f)(3) should require the Postal Service to inform the person against whom the penalty is being assessed of the opportunity for a hearing pursuant to subsection (f)(4).

Second, subsection (f)(6) should allow the court of appeals to review the facts underlying a decision of the Postal Service to assess civil penalties should such a decision be appealed.

Thank you very much for this opportunity to testify on this important piece of legislation, Mr. Chairman.

Mr. CLAY. Thank you. You mentioned that your ethical business practices committee has investigated 25,000 complaints of false representation and fraud. Have they found any?

Mr. BARTON. Yes. Let me explain our setup. Our mail order action line is the group of people within the association which received the complaints. They got them through the mail. We also have a telephone number. Those are the people who handled 25,000 complaints. Most of those complaints—and I am going to have to get the specific number for you because our director of ethical practices couldn't give them to me on the phone yet when I was talking to him—most of those complaints are handled very quickly by writing or calling a company and resolving it right away. There might be a case such as a magazine subscription which was fraudulently ordered for somebody or something like that case, so we would say probably 90 to 95 percent of our cases are handled in that way.

I don't know right now the number of cases that have gone before the ethical business practices committee. Quite a few have.

We estimate that approximately 300 contacts, and it is probably 300 cases, within the last year, have been made with the Postal Inspection Service through our director of ethical business practices. He told me on the phone yesterday that he has made two dozen informal referrals within the past month to the Postal Inspection Service around the country. It hasn't always been in Washington. He calls all over the country. He works very closely with them. Most of those, by the way, are work-at-home schemes. We get a lot of complaints about those.

Mr. CLAY. But the procedure is that if you find any credibility to the charges you turn those over to the Postal Service?

Mr. BARTON. We will turn them over. We turned none over to the FTC in the past year, but we have turned several over to the Postal Service. Yes; we have no compunction. In fact, it is written in the bylaws of our association. If they find that the laws have been violated, the material must be turned over.

Mr. CLAY. What is the organization's position on granting the Postal Service subpena authority?

Mr. BARTON. We are ambivalent about it. On the one hand we recognize the fact that the Postal Service may consider that it needs subpena authority in order to enforce this new legislation effectively and we sympathize with that, but the provisions so far that we have turned over to our lawyers to provide this kind of power have frightened us a little bit.

We have—I guess as a lot of other people have—on occasion been subjected to broad scale subpena power in which on fishing expeditions an administrative agency had gone into records of a company and spent thousands and thousands of dollars and come up with nothing, and I guess to be very frank about it, some of our people are afraid that that would happen.

I think that it is conceivable that we could work out something which would provide the Postal Service with the authority it needs to go in quickly and surgically to get the material it needs without raising the fear of the industry that it would be used as a harassment technique.

I have talked to Mr. Davis about it and we are certainly willing to have our lawyers contact you and the Postal Service to see if any satisfactory language from our viewpoint could be worked out.

Mr. CLAY. I would like to discuss the matter with you.

You made the statement that you would like to have the appeals court conduct another trial. Do you know of any other instances where this is permitted?

Mr. BARTON. No. I can try to find some for you, but I don't know right off-hand; no. I would imagine in order to just be consistent legally that you would probably have to do what Mr. Davis suggested; that is, allow the district court to hold trial de novo and maybe not go through the administrative procedures that the Postal Service has.

If it was an either/or situation, I think we would stick with the administrative procedure that the Postal Service provides and just be assured that the court of appeals would study the factual record carefully and if there were any glaring errors we would have the right to challenge them. Again you are not talking to an attorney.

Mr. CLAY. You handle yourself as one.

Mr. BARTON. I hope that is a compliment.

Mr. CLAY. We will discuss it later.

I understand that a similar bill to this one is working its way through the Senate, and I also understand that it has criminal provisions in it. Is that correct?

Mr. BARTON. I don't remember criminal provisions in it. I believe, though I haven't sat down line by line, that Senator Glenn's bill, which is his large omnibus postal bill, is identical to this one with the exception of subpena power.

Mr. CLAY. But no criminal provisions?

Mr. BARTON. Not that I can recall, but I would have to go back and read it.

Mr. CLAY. Thank you, I have no further questions.

Mr. Johnson?

Mr. JOHNSON. I have no questions, Mr. Chairman.

Mr. CLAY. That concludes the hearing for today.

Thank you.

[Whereupon, at 11 a.m., the hearing was concluded.]

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